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Attorneys for Defendants
City of Henderson, Officer C. Watts,
Officer B. Shaffer, Sgt. K. Abernathy

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MARK CLIFFORD SYKES,

Plaintiff,

V.

CITY OF HENDERSON (A.K.A.)
HENDERSON POLICE DEPARTMENT of
CLARK COUNTY NEVADA, OFFICER C.
WATTS P#2171, OFFICER B. SHAFFER
P#2237, SERGEANT K. ABERNATHY
P#1207 in their individual capacity, et.al.,

Defendants.

CASE NO.: 2:22-cv-00956-JAD-EJY

EMERGENCY MOTION TO
DISMISS THE REMAINING CLAIMS
FROM PLAINTIFF'S FIRST
AMENDED VERIFIED COMPLAINT
FOR PLAINTIFF'S FAILURE TO
APPEAR FOR HIS DEPOSITION
AND FOR AN AWARD OF COSTS

EMERGENCY MOTION ON SHORTENED TIME

Defendants City of Henderson, Officer C. Watts, Officer B. Shaffer, and Sgt. K. Abernathy (collectively referred to as “Defendants”) by and through their attorney Nancy D. Savage, Esq., Assistant City Attorney for the City of Henderson, submit their Emergency Motion to Dismiss the Claims Remaining From Plaintiff’s First Amended Verified Complaint for Plaintiff’s Failure to Attend his Deposition, and to Recover Costs, pursuant to Fed. R. Civ. P. 37, Fed. R. Civ. P. 16, and

1 LR 7-4, for the reasons set forth herein and in the attached Declaration of Counsel, Nancy D. Savage,
2 in support of this motion being decided as an Emergency Motion on Shortened Time.

3 This motion is made and based on the attached Declaration of Nancy D. Savage, pursuant to
4 LR 7-4, the pleadings and papers on file herein, the points and authorities and exhibits attached hereto
5 and the oral argument of counsel, at the time of hearing, if any.
6

7

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I.**

10 **RELEVANT BACKGROUND**

11 **A. BRIEF PROCEDURAL HISTORY**

12 Plaintiff Mark Clifford Sykes, representing himself, initiated this action against the
13 Defendants by filing a Verified Complaint on June 16, 2022. ECF 1-2. Plaintiff also sought forma
14 pauperis status on the same date. ECF 1. The Complaint alleged claims arising from events alleged
15 to have occurred on June 17, 2021, at Morrell Park in Henderson, Nevada during the Henderson
16 Police Department's response to a 911 call concerning a carjacking.
17

18 Because Plaintiff was appearing pro se, his Complaint was screened by the court pursuant to
19 18 USC §1915(e)(2). During the screening process, Plaintiff was ordered to file an amended
20 complaint, which he filed on November 3, 2022. ECF 6. The First Amended Complaint then went
21 through the screening process. At the conclusion of the court's screening process, the court entered
22 its Order Resolving Objections to Report and Recommendations, Dismissing Some Claims, and
23 Directing Service of Process on the Defendants. ECF 10. The Summons were issued by the court
24 at the end of September 2023 and served in October of 2023. Defendants responded with a Motion
25 to Dismiss filed on November 9, 2023. ECF 18. The Order Granting in Part, the Defendants' Motion
26 to Dismiss was entered on June 28, 2024. (ECF 32)



Pursuant to the court's order, the parties held a conference and agreed upon a Stipulated Discovery Plan and Scheduling Order that was entered by the court on December 27, 2023. The close of discovery was set for June 26, 2024. ECF 26. On June 5, 2024, the court entered its order entering the parties' Stipulation to Extend Discovery, First Request, which extended discovery to August 26, 2024. ECF 30. After the court ruled upon the Defendants' Motion to Dismiss, the parties were directed to meet and confer and submit a revised Discovery Plan and Scheduling Order. The revised Discovery Plan and Scheduling Order agreed upon by the parties was entered on August 8, 2024 and extended discovery to March 13, 2025. ECF 36. Dispositive motions are currently due on May 1, 2025.

A. DISCOVERY SCHEDULING

The parties engaged in written discovery over the course of 2024 with Plaintiff serving final sets of interrogatories to the City and two of the defendant officers in early February of 2025.

In December 2024, Defendants' counsel requested that the Plaintiff provide dates in January and/or February when he could be available for deposition. Plaintiff had moved out of Nevada to Arkansas earlier in 2024, and Defendants' counsel advised that she was willing to take the deposition remotely but needed information concerning his location so that a court reporter facility could be located for the deposition location in Arkansas.

On February 6, 2025, with discovery cutoff approaching and no response from Plaintiff, Defendants served a Notice of Taking Plaintiffs' Videotaped Deposition. **Exhibit A**. On February 11, 2025, counsel followed up with an email to Plaintiff, providing another copy of the Notice of Taking Plaintiff's Videotaped Deposition, and advised that Mr. Sykes' deposition could, in the alternative, go forward remotely, on March 5, 2025, at a court reporter's facility in Little Rock, Arkansas. Little Rock, Arkansas was the closest facility to Plaintiff's residence that the defense had been able to locate. A copy of the February 11, 2025, email is attached as **Exhibit B**. Plaintiff agreed



1 to have his deposition be taken remotely from Little Rock. Plaintiff's confirming email of February
2 12, 2025, is attached as **Exhibit C**, at pg. 1. The Amended Notice of Plaintiff's Deposition setting
3 Plaintiff's deposition to go forward in Little Rock Arkansas on March 5, 2025, was served by mail
4 and email upon Mr. Sykes on February 18, 2025. The Amended Notice of Taking Plaintiff's
5 Videotaped Deposition is attached as **Exhibit D**. The email also transmitting the Amended Notice of
6 Taking Plaintiff's Videotaped Deposition to Plaintiff on February 18, 2025, is attached as **Exhibit E**,
7 at pg. 1.

8
9 As stated in the Declaration of Counsel, Nancy D. Savage ("Declaration of Counsel")
10 attached hereto, in February 2025 in the same time frame that arrangements were being made for Mr.
11 Sykes' deposition, defense counsel was also trying to set up a meet and confer to address issues with
12 Plaintiff's Answers to Defendants' Interrogatories and Responses to Defendants' Requests for
13 Production. Dates in February were proposed, see **Exhibit A**, but based upon Mr. Sykes' availability,
14 the meet and confer was not scheduled until March 3, 2025, two days before Mr. Sykes' deposition.

15
16 On March 3, 2025, prior to the time set for the meet and confer, Mr. Sykes provided multiple
17 emails with supplemental information to his discovery responses. There was enough provided that
18 counsel did not have time to thoroughly review it before the scheduled meet and confer. It appeared
19 that some of what was in issue had been provided by Plaintiff, and some had not. Since Plaintiff's
20 deposition was only two days away, Defendants' counsel decided that discussion of the areas still in
21 issue could be covered at Plaintiff's deposition. On that basis, the March 3, 2025, meet and confer
22 was cancelled. See Declaration of Counsel.

23
B. PLAINTIFF'S DEPOSITION

24
25 Mr. Sykes had agreed that his deposition would start at 12:30 pm PST on March 5, 2025.
26 Defendants had arranged for a court reporter, and videographer, and had reserved a room at the court
27 reporter's facility in Little Rock Arkansas for the deposition. Approximately three hours before the
28



1 deposition was set to start, Defendants' attorney received a letter by email from an attorney, Ariel E.
 2 Mitchell, stating that her Miami, Florida firm had been retained to represent Mr. Sykes in the above-
 3 referenced case. Ms. Mitchell further stated that, "Mr. Sykes has informed us that there was a
 4 deposition scheduled today in Little Rock, AR which obviously must be rescheduled given the present
 5 circumstances." Ms. Mitchell also stated that over the next week she and her local counsel would file
 6 their appearances in the case. A copy of Ms. Mitchell's letter, and transmittal email dated March 5,
 7 2025, are attached as **Exhibit F**.

9 **C. LACK OF COMMUNICATION FROM PLAINTIFF OR HIS COUNSEL AFTER
 10 CANCELLATION OF DEPOSITION**

11 Defendants' counsel acknowledged Ms. Mitchell's correspondence and advised that it was
 12 expected that Ms. Mitchell would reimburse the cancellation fees that the City would incur due to the
 13 last-minute cancellation of the deposition. Ms. Mitchell was also advised that Defendants expected
 14 to serve supplemental discovery responses later in the week, and would serve them on her, based
 15 upon her representation that she had been retained as Mr. Sykes' attorney. Ms. Mitchell was advised
 16 that the current deadlines in the case remained in effect. Defense counsel's letter to Ms. Mitchell with
 17 the transmittal email is attached as **Exhibit G**. Supplemental discovery was served upon Mark Sykes,
 18 c/o Ms. Mitchell on March 13, 2025.

20 By March 31, 2025, over three weeks after Ms. Mitchell advised that she had been retained
 21 to represent Mr. Sykes and that she would be entering an appearance within the week in this case,
 22 there had still not been an appearance by any attorney for Mr. Sykes. There had been no further
 23 communication from Plaintiff's purported attorneys. On March 31, 2025, Defendants' counsel
 24 emailed another letter to Ms. Mitchell asking whether she is still representing Mr. Sykes in this case
 25 and advising that Defendants were considering bringing a motion concerning Mr. Sykes' non-
 26 appearance at his deposition. *A meet and confer was requested with dates and times of availability
 27 provided.* Reimbursement for the \$550.00 cancellation fees incurred by the City as a result of the



CITY ATTORNEY'S OFFICE
 CITY OF HENDERSON
 240 S. WATER STREET MSC 144
 HENDERSON, NV 89015

1 late cancellation of Plaintiff's deposition was also requested, and a copy of the invoice was provided.
 2 The letter, invoice attachment and email transmittal are attached as **Exhibit H**.

3 There has been no response to Defendants' counsel's March 31, 2025, correspondence from
 4 Ms. Mitchell or any other attorney. An appearance in the case has not been made in this case by Ms.
 5 Mitchell or any other attorney. Due to Ms. Mitchell's asserted representation of Mr. Sykes, counsel
 6 for Defendants is in a position where she cannot contact Mr. Sykes directly. There has not been any
 7 further contact from Mr. Sykes in his *pro se* capacity since March 3, 2025, two days before his
 8 deposition was set to proceed. Discovery closed on March 13, 2025.

10 **II.**

11 **LEGAL ARGUMENT**

12 **A. STANDARDS**

13 The Court may impose sanctions for the failure of a party to appear for a properly noticed
 14 deposition. Fed. R. Civ. P. 37(d)(1)(A)(i). The sanctions that may be imposed include those listed in
 15 Rule 37(b)(2)(A)(i)-(vi), some of which contemplate severe sanctions such as striking the pleadings
 16 or dismissal. *See* Fed. R. Civ. P. 37(d)(3). Case-dispositive sanctions are warranted only in "extreme
 17 circumstances." *Fjelstad v. Am. Honda Motor Co.*, 762 F.2d 1334, 1338 (9th Cir. 1985).

18 Instead of or in addition to these sanctions, the court *must* require the party and/or its attorney
 19 to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was
 20 substantially justified or other circumstances make an award of expenses unjust. Fed. R. Civ. P.
 21 37(d)(3).

22 **B. PLAINTIFF'S CASE SHOULD BE DISMISSED FOR FAILING TO APPEAR FOR**
HIS DEPOSITION AND FAILING TO RESPOND OR PARTICIPATE IN EFFORTS
TO RESCHEDULE IT

23 In analyzing a request for case-dispositive sanctions, the Court considers (1) the public's interest
 24 in expeditious resolution of litigation; (2) the Court's need to manage its docket; (3) the risk of
 25



1 prejudice to the opposing party; (4) the public policy favoring disposition of cases on their merits;
 2 and (5) the availability of less drastic sanctions. *Computer Task Grp., Inc. v. Brotby*, 364 F.3d 1112,
 3 1115 (9th Cir. 2004); *Hester v. Vision Airlines, Inc.*, 687 F.3d 1162, 1169 (9th Cir. 2012). Although
 4 it is preferred, it is not required that the district court make explicit findings that it has considered
 5 these factors. *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999). These factors are tools of
 6 analysis, not “conditions precedent” to the district court’s imposition of such sanctions. *Allen v. Bayer*
 7 *Corp. (In re PPA)*, 460 F.3d 1217, 1226 (9th Cir. 2006)

9 Plaintiff failed to appear for his deposition at the properly noticed time and location. Pursuant to
 10 Fed. R. Civ. P. 37(d)(1)(A)(i) the Court may order sanctions if a person who is served with proper
 11 notice fails to appear for their deposition. Courts within the Ninth Circuit have repeatedly recognized
 12 that a party fails to appear for a deposition within the meaning of Rule 37(d) when the party
 13 unilaterally cancels the deposition shortly before it is set to take place, as Mr. Sykes did here. See,
 14 e.g., *Elizondo v. SeaWorld Parks & Entm't, Inc.*, Case No.: 20-cv-00829-GPC-BGS, 2021 WL
 15 1923287, at *9 (S.D. Cal. May 13, 2021) (citing *Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257,
 16 269 (9th Cir. 1964)) (simply informing opposing counsel deposition that the party would not appear
 17 for a noticed deposition was insufficient to relieve the party of the duty to appear).
 18

19 A proposed deponent and their counsel have a duty to appear at the properly noticed
 20 deposition, unless they have obtained a court order that postpones or dispenses with their duty to
 21 appear. *Elizondo, supra*.

22 The broad, underlying purpose of the Federal Rules of Civil Procedure is to “secure the just,
 23 speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1. “Orderly
 24 and expeditious resolution of disputes” is of utmost importance in the rule of law.
 25 *Phenylpropanolamine Prods. Liab. Litigation*, 460 F.3d 1217, 1227 (9th Cir. 2006) “[D]elay in
 26



1 reaching the merits, whether by way of settlement or adjudication, is costly in money, memory,
2 manageability, and confidence in the process.” *Id.*

3 Plaintiff failed to appear for his deposition after agreeing to the date, time and location.
4 Defendants made arrangements for Plaintiff’s deposition to be taken in Little Rock, Arkansas
5 reasonably close to the location in Arkansas where he currently resides. Defendants did considerable
6 work, compared with what would have been necessary had Mr. Sykes’ deposition been noticed to be
7 taken at defense counsel’s office. It was necessary to locate an appropriate court reporting facility
8 where Plaintiff could appear to be deposed remotely. Costs were incurred due to last-minute
9 cancellation of the facility, the court reporter and the videographer in the sum of \$550.00. See Invoice
10 attached to Letter to Ariel Mitchell, Esq. as **Exhibit H**.

11 Plaintiff initiated this action approximately three years ago, in June of 2022. Due to the
12 court’s thorough screening process, Defendants’ first notice of the lawsuit did not occur until they
13 were served with Plaintiff’s Amended Complaint approximately a year and a half later in October
14 2023. Mr. Sykes had years to seek and retain counsel, but literally did not do so until the day of, or
15 the day before his deposition. Mr. Sykes did not respond to Defendants’ request for earlier availability
16 dates, so there was delay in setting his deposition.

17 It is notable that the only communication that Defendants’ attorney has **ever** received from
18 the attorney purportedly retained to represent Plaintiff, occurred three hours before Mr. Sykes’
19 deposition was set to start, and a week before discovery cutoff. Ms. Mitchell’s only involvement in
20 this action was to insist that Mr. Sykes’ deposition be delayed despite the fact Mr. Sykes had agreed
21 to the scheduled time and place for his deposition and had agreed to the discovery cutoff deadline in
22 the last Stipulated Discovery Plan and Scheduling Order (ECF 36). Mr. Sykes’ deposition had been
23 properly noticed. In light of Ms. Mitchell’s failure to formally appear as Mr. Sykes’ counsel, or to
24 respond to defense counsel’s communications, it appears that the “retention” was no more than a
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26
27
28



1 delaying tactic by Plaintiff or on Plaintiff's behalf. It has been seven weeks since Ms. Mitchell's only
 2 communication on March 5, 2025. No attorney having appeared on Plaintiff's behalf to date, Plaintiff
 3 continues to represent himself in this case. Ms. Mitchell has failed to respond to subsequent
 4 communications from defense counsel and has failed to appear as Mr. Sykes' attorney in this case.
 5 However, pursuant to the Nevada Rules of Professional Conduct, counsel for Defendants believes
 6 that under the circumstances, she is precluded from contacting Mr. Sykes.

7
 8 Rule 4.2 provides as follows:

9 In representing a client, a lawyer shall not communicate about the subject
 10 of the representation with a person the lawyer knows to be represented by
 11 another lawyer in the matter, unless the lawyer has the consent of the other
 12 lawyer or is authorized to do so by law or a court order.

13 This factor weighs in favor of dismissal.

14 **1. Management of the Court's Docket**

15 Federal Rule of Civil Procedure 16 is the central pretrial rule that authorizes courts to manage
 16 their cases "so that disposition is expedited, wasteful pretrial activities are discouraged, the quality of
 17 the trial is improved, and settlement is facilitated." *In re Phenylpropanolamine Prods. Liab. Litig.*,
 18 460 F.3d 1217, 1227 (9th Cir. 2006). Specifically, Rule 16(f) "puts teeth into these objectives by
 19 permitting the judge to make such orders as are just for a party's failure to obey a scheduling or pretrial
 20 order, including dismissal." *Id.* Rule 16(f) provides in relevant part that "[o]n motion or on its own,
 21 the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)–(vii), if a party
 22 or its attorney ... fails to obey a scheduling order or other pretrial order." Fed. R. Civ. P. 16(f)(1)(C).
 23 *Reid v. Portfolio Recovery Associates*, 2016 WL 6652465 (D. Nev. 2016).

24
 25 Plaintiff has violated the final Stipulated Discovery Plan and Scheduling Order ECF 36r. He did
 26 not appear for his duly noticed deposition with the implicit intent of delaying Defendants' ability to
 27 complete discovery needed before bringing their dispositive motions at the conclusion of discovery.



1 Plaintiff individually and through his retained attorney refused to proceed with his deposition as
 2 noticed and subsequently has refused to engage in efforts to reschedule the deposition after Plaintiff
 3 unilaterally canceled the March 5, 2025 deposition.

4 Plaintiff's failure to appear for his deposition followed by complete stonewalling of any effort
 5 to try to get the deposition rescheduled has made it impossible for the case to move forward and for
 6 the court to effectively manage its docket.
 7

8 This factor weighs in favor of dismissal.

9 **2. Prejudice to Defendant**

10 “A defendant suffers prejudice if the plaintiff’s actions impair the defendant’s ability to go to
 11 trial or threaten to interfere with the rightful decision of the case.” *Adriana Int’l Corp. v. Thoeren*,
 12 913 F.2d 1406, 1413 (9th Cir. 1990). Plaintiff’s deposition is an important element of the Defendants’
 13 discovery. The Defendants requested Plaintiff’s availability a few months before the deposition was
 14 finally set. Plaintiff did not communicate dates of availability as requested, and Defendants ultimately
 15 selected a date about a month away and noticed the Plaintiff’s deposition.
 16

17 Plaintiff’s failure to appear for his deposition and continuing delays afterwards, in an apparent
 18 attempt to “run out the clock”, is highly prejudicial to Defendants, who are entitled to conduct
 19 discovery, and to file dispositive motions for the court’s consideration before a case proceeds to trial.
 20 At this juncture the dispositive motions deadline is rapidly approaching on May 1, 2025. Plaintiff’s
 21 deposition cannot feasibly be taken before the deadline, and the Defendants cannot submit a complete
 22 and comprehensive motion(s) to the court without the information that would be expected to be
 23 obtained through Plaintiff’s deposition.
 24

25 This factor weighs in favor of dismissal.
 26
 27
 28



1 **3. Disposition of Case on its Merits**

2 The public policy favoring disposition of cases on the merits weighs against dismissal of a
 3 case. *Phenylpropanolamine*, 460 F.3d at 1228. Nevertheless, “this factor lends little support to a party
 4 whose responsibility it is to move a case toward disposition on the merits but whose conduct impeded
 5 progress in that direction.” *Id.* (quotation omitted). Plaintiff is the party responsible for moving his
 6 case forward, his failure to do so has caused delay and thwarted progress of the case. *Reid, supra.*
 7 Plaintiff’s delays and ultimately his refusal to be deposed have caused this case to come to a standstill
 8 and has prejudiced the Defendants’ ability(ies) to complete the discovery necessary to fully defend
 9 the case and to have the information needed for dispositive motions and/or trial.
 10

11 Under the circumstances, this factor weighs in favor of dismissal sanctions.
 12

13 **4. Less Drastic Sanctions**

14 Plaintiff has delayed and refused to participate in his deposition. Discovery has closed, and
 15 the dispositive motions deadline is a little over a week away. A less drastic sanction would require
 16 discovery to be reopened for the limited purpose of providing additional time for the Plaintiff to be
 17 deposed. However, Plaintiff’s deposition may lead to additional information or assertions concerning
 18 possible evidence that would require further motions or stipulations to extend discovery for additional
 19 specific limited purposes if such information or new witness identities are uncovered. This would
 20 cause additional extensions of time and delays. Plaintiff’s dilatory conduct should not be rewarded
 21 and allowed to prolong the case further.
 22

23 In the event that this Court considers “less drastic” sanctions instead of dismissal, discovery
 24 should be reopened for the very limited purpose of allowing the Defendants to take the Plaintiff’s
 25 deposition, and for that deposition to be taken in Clark County, Nevada where the Plaintiff filed his
 26 lawsuit. At the conclusion of the 60 – 90 day period during which the deposition is required to go
 27 forward, the order should provide for 60 days for the filing of dispositive motions, which is the
 28

1 amount of time from the close of discovery contained in the parties' most recent stipulation and
 2 scheduling order (ECF 36).

3 **5. Bad Faith**

4 A court may impose the extreme sanction of dismissal if there has been "flagrant, bad faith
 5 disregard of discovery duties." *Wanderer v. Johnston*, 910 F.2d 652, 655–56 (9th Cir.
 6 1990) (citing *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639 (1976)). In this matter
 7 it appears from Plaintiff's tactics that the intention was to avoid and prevent his duly noticed
 8 deposition from going forward to the prejudice of Defendants and the sanction of dismissal is
 9 appropriate.

10 **6. Bad Faith Not Required**

11 A court need not find bad faith before imposing sanctions for violations of Rule 37" (*Oracle*
 12 *USA, Inc. v. SAP AG*, 264 F.R.D. 541, 545 (N.D. Cal. 2009)), so long as the sanctions imposed are
 13 "just" and "specifically relate to the particular claim at issue in the order" (*United States v. Nat'l Med.*
 14 *Enters., Inc.*, 792 F.2d 906, 910 (9th Cir. 1986)). Any burden to establish that noncompliance with
 15 the requirements of Rule 37 was substantially justified, or that special circumstances would render
 16 the imposition of sanctions inappropriate, is on the party facing sanctions. *See Hyde & Drath v. Baker*,
 17 24 F.3d 1162, 1171 (9th Cir. 1994); *see also, Choudhuri v. Wells Fargo Bank, N.A.*, No. 15-CV-
 18 03608-VC (KAW), 2017 WL 5598685, at *5 (N.D. Cal. Nov. 21, 2017)

19 The sanctions sought here are just and specifically related to the circumstances that exist as the
 20 result of Plaintiff's refusal to proceed with his properly noticed deposition. A sanction of dismissal is
 21 appropriate under the circumstances.

22 **7. Analysis of the Factors in this Case Favor Dismissal**

23 The above factors "are not a series of conditions precedent before the judge can do anything,"
 24 but a "way for a district judge to think about what to do." *Valley Eng'rs Inc. v. Elec. Eng'g Co.*, 158



F.3d 1051, 1057 (9th Cir. 1998). “The first two of these factors favor the imposition of sanctions in most cases, while the fourth cuts against a ... dismissal sanction. Thus[,] the key factors are prejudice and availability of lesser sanctions.” *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990); see also *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990).

Prejudice to the Defendants has been established in the instant case. The potential “less drastic sanctions” reward the Plaintiff’s avoidance tactics and prejudice the Defendants with even further delay.

C. PLAINTIFF SHOULD BE ORDERED TO REIMBURSE THE CITY OF HENDERSON FOR THE COSTS INCURRED DUE TO THE LAST-MINUTE CANCELLATION OF PLAINTIFF’S DEPOSITION

Instead of or in addition to the other enumerated sanctions, courts finding a Rule 37(d) violation must award reasonable expenses, including attorneys’ fees, unless the failure to appear was substantially justified or other circumstances make an award of expenses unjust. *See Fed. R. Civ. P. 37(d)(3)*. The party facing an award of expenses bears the burden of establishing substantial justification or circumstances making an award of expenses unjust. *Hyde & Drath v. Baker*, 24 F.3d 1162, 1171 (9th Cir. 1994). In the instant case, as evidenced by Ariel Mitchell’s March 5, 2025 letter (**Exhibit G**) Plaintiff did not plan to appear for his deposition, and, in fact, did not appear. As described above, the City of Henderson incurred cancellation fees for the court reporter, the videographer and the facility that had been reserved in the sum of \$550.00.

In addition to any sanctions that the Court imposes upon Plaintiff, Plaintiff should be required to reimburse \$550.00 to the City of Henderson within 30 days of the Court’s order.

III.

CONCLUSION

For the foregoing reasons, Defendants City of Henderson, Officer C. Watts, Officer B. Shaffer, and Sgt. K. Abernathy, respectfully request this Honorable Court to the above-entitled



1 motion as an emergency motion on shortened time pursuant to LR 7-4, and to enter its order
2 dismissing all of the Plaintiff's remaining claims in this action and requiring Plaintiff to reimburse
3 the City of Henderson the sum of \$550.00 for the costs that it has incurred due to the last minute
4 cancellation of Plaintiff's March 5, 2025 deposition.

5 DATED this 22nd day of April 2025.
6

7 CITY OF HENDERSON

8 /s/ Nancy D. Savage

9 NANCY D. SAVAGE
10 Assistant City Attorney
11 Nevada Bar No. 392
12 240 Water Street, MSC 144
13 Henderson, Nevada 89015

14 Attorney for Defendants
15 "Henderson Police Department," Officer C. Watts,
16 Officer B. Shaffer, Sgt. K. Abernathy
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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of April 2025, I served the above and foregoing
EMERGENCY MOTION TO DISMISS THE REMAINING CLAIMS FROM PLAINTIFF'S
FIRST AMENDED VERIFIED COMPLAINT FOR PLAINTIFF'S FAILURE TO APPEAR
FOR HIS DEPOSITION AND FOR AN AWARD OF COSTS, through the Court's electronic
filing system and by depositing a true and correct copy thereof in the United States Mail, postage
fully prepaid thereon, and addressed to the following:

Mark Clifford Sykes
c/o Ariel E. Mitchell, Esq.
P.O. Box 12864
Miami, Florida 33101

Mark Clifford Sykes
P.O. Box 674
Russellville, Arkansas 72811

/s/ Laura Kopanski
Employee of the Henderson City Attorney's Office



1 **DECLARATION OF NANCY D. SAVAGE IN SUPPORT OF DEFENDANTS'**
 2 **EMERGENCY MOTION PURSUANT TO LR 7-4 and MOTION TO DISMISS PURSUANT**
 3 **TO Fed. R. Civ. P. 37 and Fed. R. Civ. P. 16**

4 Nancy D. Savage declares, and states as follows:

5 1. I am an attorney duly licensed and practicing law in the State of Nevada, County of
 6 Clark, and am a member of the Nevada State Bar in good standing. I am currently employed as an
 7 Assistant City Attorney by the City of Henderson at 240 Water Street, Henderson, Nevada 89015 and
 8 represent the Defendants City of Henderson, Officer C. Watts, Officer B. Shaffer, and Sgt. K.
 9 Abernathy in the above-entitled case.

10 2. I am over the age of 18 years and have personal knowledge of the facts stated herein,
 11 except for those stated on information and belief, and as to those, I believe them to be true. I am
 12 competent to testify to the facts set forth herein and will so testify if called.

13 **SUPPORT FOR EMERGENCY MOTION PURSUANT TO LR 7-4**

14 3. I submit this Declaration in compliance with **LR 7-4** and in support of Defendants'
 15 Emergency Motion to Dismiss the Remaining Claims from Plaintiff's First Amended Verified
 16 Complaint for Plaintiff's Failure to Appear for his Deposition and for an Award of Costs to be
 17 considered by the court on an emergency basis and in support state as follows:

18 (a) **The nature of the emergency** is the impending dispositive motions deadline,
 19 May 1, 2025, in conjunction with the Declarant's inability to reschedule and take
 20 Plaintiff's deposition, after Plaintiff unilaterally cancelled his deposition, 3 hours
 21 before its scheduled commencement. Plaintiff has subsequently failed to engage in any
 22 effort to have the deposition rescheduled. The motion needs to be decided before the
 23 dispositive motion deadline on May 1, 2025, as scheduled by the Stipulated Revised
 24 Discovery Plan and Scheduling Order entered on August 8, 2024 (ECF 36). Otherwise,
 25 there is not enough time to have the motion heard in the ordinary course.



1 Plaintiff has represented himself pro se throughout this action. In December
2 of 2024, Declarant sought dates of availability from Plaintiff for setting his deposition
3 in early 2025. After Plaintiff failed to respond, Defendants properly served a Notice
4 of Taking Plaintiff's Videotaped Deposition on February 6, 2025 upon Plaintiff setting
5 his deposition on March 5, 2025. Attached as **Exhibit A**. On February 11, 2025,
6 Declarant followed up with an email to Plaintiff, providing another copy of the Notice
7 of Taking Plaintiff's Videotaped Deposition, and advised that Mr. Sykes' that his
8 deposition could, in the alternative, go forward remotely, on March 5, 2025 at a court
9 reporter's facility in Little Rock, Arkansas if he consented. See **Exhibit B**. Plaintiff
10 agreed to have his deposition be taken remotely from Little Rock and agreed to the
11 time for the deposition to proceed on that date. See **Exhibit C**. An Amended Notice
12 of Taking Plaintiff's Videotaped Deposition was duly served by mail on February 18,
13 2025. **Exhibit D**. A copy of the Amended Notice of Taking Plaintiff's Videotaped
14 Deposition was also emailed to Plaintiff on February 18, 2025. **Exhibit E, pg. 1.**
15

16 In the same time frame that Plaintiff's deposition was in the process of being
17 scheduled, Declarant was also trying to schedule a meet and confer with Plaintiff
18 concerning his written discovery responses. Plaintiff was not willing to set a date for
19 the meet and confer until March 3, 2025, two days before his deposition. On March 3,
20 2025, Plaintiff emailed additional information to supplement his discovery responses
21 in issue. Due to the manner or format in which some of the additional was provided,
22 additional time was needed to review it. Although it was clear that some of the
23 discovery in issue had not been supplemented or responded to, Declarant determined
24 that the issues remaining with Plaintiff's discovery responses could better be
25 addressed during Plaintiff's deposition, and the meet and confer was cancelled. During
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1 the several communications received from Plaintiff on March 3, 2025, Plaintiff
2 provided no indication that there was any reason that his deposition would or could
3 not proceed as scheduled on March 5, 2025.

4 On March 5, 2025, three hours before Plaintiff's deposition was scheduled to
5 start, Declarant received a letter from a Miami, Florida attorney named Ariel Mitchell
6 stating that she had been retained to represent the Plaintiff in this case and that the
7 Plaintiff's deposition would have to be rescheduled. Ms. Mitchell further advised that
8 she and her local counsel would be entering appearances in the case "over the next
9 week." **Exhibit F.**

10 On March 13, 2025, Declarant served Supplemental discovery responses upon
11 Ms. Mitchell in her capacity as Plaintiff's retained attorney in the case. Ms. Mitchell
12 had not formally appeared in the case at that point.

13 On March 31, 2025, Declarant sent a letter to Ms. Mitchell asking whether she
14 was still representing Plaintiff and provided proposed dates and times for a meet and
15 confer to address rescheduling Plaintiff's deposition. **Exhibit H.** No response has
16 been received. To date neither Ms. Mitchell nor any other attorney has entered an
17 appearance in this case to represent Plaintiff. There have also been no further
18 communications from Plaintiff, who pursuant to the court's records, currently
19 continues to represent himself.

20 Although Declarant's March 31, 2025 letter to Ms. Mitchell advised that if I
21 did not receive a response by the Wednesday following the date the letter was emailed
22 to Ms. Mitchell, it would be assumed that she was not representing the Plaintiff,
23 Declarant has been hesitant to contact the Plaintiff directly because Ms. Mitchell has
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1 not retracted the statement in her March 5, 2025 letter that she is representing the
 2 Plaintiff, Mark Sykes in this matter.

3 The Nevada Rules of Professional Conduct, Rule 4.2 expressly precludes an
 4 attorney from contacting a person that the attorney knows to be represented by another
 5 lawyer in the in case. As a result, Declarant did not contact Plaintiff directly to try to
 6 have a meet and confer. Plaintiff is on the court's electronic service list and should
 7 receive this motion through the court that way, when this motion is filed.

8 **(b) A meet and confer was not able to be held due to the lack of response from**
 9 **Plaintiff's purported attorney and a lack clarity about whether Plaintiff has**
 10 **counsel representing him regarding this case.**

11 I certify that I attempted to set up a meet and confer with Plaintiff's purported
 12 attorney and received no response. Almost two months after her letter stating that she
 13 is representing Plaintiff, that attorney has not appeared in this case, has not responded
 14 to Declarant's letters/emails seeking a meet and confer, or made a definitive statement
 15 about whether she still represents Plaintiff, and ,if so, when she will be appearing in
 16 the case. Although Plaintiff remains in the court's record as acting pro se, Declarant
 17 did not want to violate the Nevada Rules of Professional Conduct by contacting
 18 Plaintiff directly under the circumstances present here.

19 **(c) An emergency exists due to the short time before the dispositive motions**
 20 **deadline of May 1, 2025, the Plaintiff's unilateral cancellation of his deposition, and**
 21 **his and/or his "representative's" ongoing failure to address or engage in any effort to**
 22 **get Plaintiff's deposition rescheduled. Under the circumstances the Defendants'**
 23 **current Motion to Dismiss and for an award of the costs incurred due to Plaintiff's**
 24 **failure to appear for his deposition is appropriate. There is not enough time to have**



1 this said motion heard and decided in the ordinary course before the May 1, 2025,
2 dispositive motions deadline.

3 Declarant represents the moving Defendants. My contact information is as
4 follows:

5 Nancy D. Savage, Esq.
6 Henderson City Attorney's Office
7 240 Water Street, MSC 144
8 Henderson, Nevada 89015
9 nancy.savage@cityofhenderson.com
10 (702) 267-1237

11 Plaintiff, Mark Clifford Sykes is representing himself and his contact information is
12 as follows:

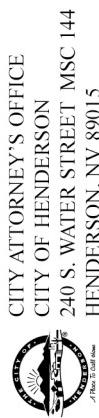
13 Mark Clifford Sykes
14 P.O. Box 674
15 Russellville, Arkansas 72811
16 (725) 254-0279

17 Plaintiff receives electronic filings and will receive the motion when it is filed.

18 A copy of Defendants' Emergency Motion to Dismiss the Remaining Claims from
19 Plaintiff's First Amended Verified Complaint for Plaintiff's Failure to Appear for his
20 Deposition and for an Award of Costs is also being sent by mail, and by email, upon
21 filing to:

22 Ariel E. Mitchell, Esq.
23 P.O. Box 12864
24 Miami, Florida 33101
25 (305) 903-5835
26 ariel@arielesq.com

27 There are no other parties involved in this action.



IN SUPPORT OF EMERGENCY MOTION TO DISMISS AND FOR AWARD OF COSTS

4. The Exhibits attached hereto and referenced within the Emergency Motion to Dismiss
3 the Remaining Claims from Plaintiff's First Amended Complaint for Plaintiff's Failure to Appear for
4 his Deposition and for an Award of Costs, are as follows:

5 Exhibit A is a true and accurate copy of the Notice of Taking Plaintiff's Videotaped
6 Deposition served upon Plaintiff on March 6, 2025.

8 Exhibit B is a true and accurate copy of an email sent from Nancy Savage to Mark Sykes
9 dated February 11, 2025.

10 Exhibit C is a true and accurate copy of an email sent from Mark Sykes to Nancy Savage on
11 February 12, 2025.

12 Exhibit D is a true and accurate copy of the Amended Notice of Taking Plaintiff's Videotaped
13 Deposition served upon Plaintiff on March 18, 2025.

15 Exhibit E is a true and accurate copy of an email from Nancy Savage to Mark Sykes dated
16 February 18, 2025.

17 Exhibit F is a true and accurate copy of the letter of representation received by Declarant from
18 Ariel E. Mitchell on March 5, 2025.

19 Exhibit G is a true and accurate copy of a letter from Nancy Savage to Ariel Mitchell dated
20 March 5, 2025.

22 Exhibit H is a true and accurate copy of a letter from Nancy Savage to Ariel Mitchell dated
23 March 31, 2025.

24 I declare under the penalty of perjury under the laws of the United States of America that the
25 foregoing is true and correct.

26 Dated this 22nd day of April 2025

27 /s/ Nancy D. Savage
28 NANCY D. SAVAGE